

DOCKET FILE COPY ORIGINAL

ANN BAVENDER*
ANNE GOODWIN CRUMP
VINCENT J. CURTIS, JR.
RICHARD J. ESTEVEZ
PAUL J. FELDMAN
ROBERT N. FELGAR*
ERIC FISHMAN
RICHARD HILDRETH
FRANK R. JAZZO
ANDREW S. KERSTING
EUGENE M. LAWSON, JR.
HARRY C. MARTIN
GEORGE PETRUTSAS
LEONARD R. RAISH
JAMES P. RILEY
KATHLEEN VICTORY
HOWARD M. WEISS
*NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET

ARLINGTON, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

www.fhh-telcomlaw.com

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

FRANK U. FLETCHER
(1939-1985)
ROBERT L. HEALD
(1956-1983)
PAUL D.P. SPEARMAN
(1936-1962)
FRANK ROBERSON
(1936-1961)
RUSSELL ROWELL
(1948-1977)

RETIRED
EDWARD F. KENEHAN

CONSULTANT FOR INTERNATIONAL AND
INTERGOVERNMENTAL AFFAIRS
SHELDON J. KRYS
U. S. AMBASSADOR (ret.)

OF COUNSEL
EDWARD A. CAINE*
MITCHELL LAZARUS*
EDWARD S. O'NEILL*
JOHN JOSEPH SMITH

WRITER'S DIRECT

812-0474

kersting@fhh-telcomlaw.com

October 5, 1998

BY HAND DELIVERY

Magalie R. Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

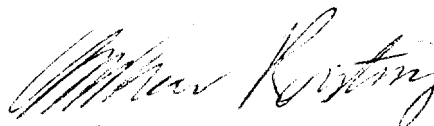
Re: Opposition to Petition for Partial Reconsideration
MM Docket Nos. 97-26 and 97-91
(Detroit, Howe and Jacksboro, Texas, and
Antlers and Hugo, Oklahoma, et al.)

Dear Ms. Salas:

Transmitted herewith on behalf of Metro Broadcasters-Texas, Inc. are an original and four copies of its "Opposition to Petition for Partial Reconsideration," filed in the above-referenced proceeding in connection with the *Report and Order*, DA 98-1650 (released August 21, 1998).

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,
FLETCHER, HEALD & HILDRETH, P.L.C.



Andrew S. Kersting
Counsel for Metro Broadcasters-Texas, Inc.

Enclosure

cc (w/ encl.): Certificate of Service (by hand & first-class mail)

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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OCT - 5 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations,
(Detroit, Howe and Jacksboro, Texas,
Antlers and Hugo, Oklahoma)

)
)
) MM Docket No. 97-26
) RM-8968
) RM-9089
) RM-9090
)
)
)

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations,
(Lewisville, Gainesville, Robinson,
Corsicana, Jacksboro, and
Mineral Wells, Texas)

)
)
) MM Docket No. 97-91
) RM-8854
) RM-9221
)
)
)

To: Chief, Allocations Branch

OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION

Metro Broadcasters-Texas, Inc. ("Metro"), licensee of Station KHYI(FM), Howe, Texas, by counsel and pursuant to Section 1.429 of the Commission's rules, hereby opposes the "Petition for Partial Reconsideration" ("Petition"), filed September 21, 1998, by Heftel Broadcasting Corporation ("Heftel"), which requests partial reconsideration of the *Report and Order*, DA 98-1650 (released August 21, 1998) ("R&O"), in the above-captioned proceeding.¹ In support of this opposition, the following is stated:

¹ Metro filed a timely Application for Review of the R&O on September 24, 1998.

I. Heftel's Petition.

In its Petition, Heftel states that the Compensation Agreement between it and Jerry Snyder and Associates, Inc. ("Snyder") has been terminated, and, in fact, relies upon the termination of that agreement as a basis for seeking reconsideration pursuant to Section 1.106(b) of the Commission's rules. Petition, pp. 4-5. In light of the termination of the parties' Compensation Agreement, Heftel requests that the Channel 240C1 allotment at Mineral Wells, Texas,² be downgraded from Channel 240C1 to Channel 240C3, and that the allotment reference coordinates "for Station KYXS(FM)" be changed from those specified in the Mineral Wells allotment rulemaking proceeding³ to those of Station KYXS' existing transmitter site. Petition, pp. 5-9 and n. 7. In addition, Heftel requests that the Commission eliminate the requirement contained in the *R&O* that program test authority for Channel 300C1 at Lewisville and Channel 300A at Robinson be withheld pending the grant of a construction permit for Station KYXS, Mineral Wells, at a location that would accommodate the allotment of Channel 237A at Jacksboro. Petition, p. 5; *see also R&O* at ¶13.

Due to the termination of the Heftel/Snyder settlement proposal, Heftel also requests that the Commission continue its comparative evaluation of the public interest benefits that it claims will result from its proposal *vis-a-vis* the benefits that would result from Metro's and Snyder's respective proposals. Heftel contends that a grant of its proposal would bring a new FM service to a substantially greater number of people than the proposals of either Metro or Snyder, and, therefore, that the Commission should grant its reconsideration request and approve the proposed reallocations

² Unless otherwise indicated, all communities referenced herein are located in the state of Texas.

³ *Mineral Wells and Winters, Texas*, 7 FCC Rcd 1991 (Allocations Branch 1992).

set forth in Heftel's July 26, 1996, Petition for Rulemaking, and the *Notice of Proposed Rule Making and Order to Show Cause* in MM Docket No. 97-91, 12 FCC Rcd 3059 (1997). Petition, pp. 6-8.

II. Heftel's Proposal is Defective Because It Failed to Protect the Reference Coordinates for the Existing Channel 240C1 Allotment at Mineral Wells.

As stated in the *R&O*, the proposed substitution and reallocation of Channel 300C1 to Lewisville is dependent upon the substitution and reallocation of Channel 300A to Robinson. The reallocation of Channel 300A to Robinson requires the substitution of Channel 237A for Channel 299A at Jacksboro, which, in turn, requires the downgrade of Channel 240C1 at Mineral Wells to Channel 240C3. *R&O* at ¶3.

Section 73.207(a) of the Commission's rules provides that the Commission will not accept petitions to amend the FM Table of Allotments unless the reference coordinates specified in the petition meet all of the minimum distance separation requirements. 47 CFR §73.207(a). Despite Heftel's proposal, Channel 237A cannot be substituted for Channel 299A at Jacksboro in compliance with the minimum distance separation requirements. As demonstrated in Exhibit 1 to Heftel's Petition for Rulemaking, the proposed substitution of Channel 237A at Jacksboro is 15.3 kilometers short-spaced to the reference coordinates for the existing Channel 240C1 allotment at Mineral Wells. Although Snyder's previous construction permit for the Channel 240C1 facility at Mineral Wells expired some time ago,⁴ Heftel is nevertheless required to protect the Channel 240C1 allotment. *See*,

⁴ As explained in Metro's Comments and Counterproposal, filed May 5, 1997, Snyder's efforts to construct its Class C1 facilities for Station KYXS, Mineral Wells, were frustrated by the death of the property owner of Snyder's proposed transmitter site, and the fact that the property owner's widow and son were unwilling to make the property available to Snyder while the property was in the deceased's estate. Although Snyder's efforts to find an alternative site were unavailing, after the estate sold the land to a local municipal water district, Snyder entered into an arrangement with the water district to use a portion of the land for its transmitter site. On
(continued...)

e.g., *Eldorado and Lawton, Oklahoma*, 5 FCC Rcd 618 (Allocations Branch 1990) (subsequent history omitted). Indeed, the Commission does not delete a channel or downgrade an existing allotment where, as here, there is an expression of interest demonstrated by the filing of an application by the initial comment deadline, even where a construction permit has been forfeited and cancelled. See *Martin, Tiptonville and Trenton, Tennessee*, DA 98-1799 (Allocations Branch, released September 11, 1998) (Commission denied a proposal to downgrade an existing allotment from Class C3 to Class A where the petitioner was the only party to express an interest in a Class A allotment, and other parties filed expressions of interest for only a Class C3 allotment); *Driscoll, Gregory and Robstown, Texas*, 9 FCC Rcd 3580, n.3 (Allocations Branch, 1994) (NPRM) (subsequent history omitted).⁵

It is well settled that proposals are required to be "technically correct and substantially complete" at the time they are filed.⁶ In this case, Snyder filed an application for the Channel 240C1

⁴(...continued)

November 25, 1996 (prior to the issuance of the *Notice of Proposed Rule Making and Order to Show Cause* in the Lewisville proceeding), Snyder filed a construction permit application (BPH-961125GI) for its new Class C1 facility at Mineral Wells, and that application remains pending. See Snyder's Comments, filed May 5, 1997, and accompanying declaration of Jerry Snyder.

⁵ See also *Martin and Tiptonville, Tennessee*, 11 FCC Rcd 12695 (Allocations Branch 1996); *Calhoun City, Mississippi*, 11 FCC Rcd 7660 (Allocations Branch 1996); *Greenfield, and Stockton, Missouri*, 10 FCC Rcd 5481 (Allocations Branch 1995) (NPRM); *Woodville Mississippi and Clayton, Louisiana*, 9 FCC Rcd 2769 (Allocations Branch 1994).

⁶ *Cloverdale, Montgomery and Warrior, Alabama*, 12 FCC Rcd 2090, 2093 (Policy and Rules Division 1997) (rejected a counterproposal as not being technically correct and substantially complete when filed because it was short-spaced to the licensed site of another station); *Carlisle, Irvine, and Morehead, Kentucky*, 12 FCC Rcd 13181, 13182 (Allocations Branch 1997) (same); *Frederiksted and Charlotte Amalie, Virgin Islands*, 12 FCC Rcd 2406, n.3 (Allocations Branch 1997) (a counterproposal was found not be technically correct and substantially complete when filed because it was 0.7 km short-spaced to a transmitter site

(continued...)

facility at Mineral Wells on November 25, 1996 (File No. BPH-961125GI) (the "Snyder Application"). The *Notice of Proposed Rulemaking and Order to Show Cause* issued in response to Heftel's rulemaking petition established an initial comment deadline of May 5, 1997. 12 FCC Rcd 3059, 3063 (1997). Thus, because Snyder expressed an interest in the Channel 240C1 allotment at Mineral Wells by filing the Snyder Application long before the comment deadline, and Heftel failed to protect the reference coordinates for that allotment in accordance with Section 73.207 of the Commission's rules, Heftel's proposal -- which is dependent upon the downgrade of the Channel 240C1 allotment at Mineral Wells to a Class C3 facility -- was not technically correct and substantially complete as of the initial comment deadline. Therefore, consistent with Commission precedent, Heftel's proposal should have been dismissed and given no consideration in this proceeding. *Cloverdale, Montgomery and Warrior, Alabama*, 12 FCC Rcd 2090; *Carlisle, Irvine, and Morehead, Kentucky*, 12 FCC Rcd 13181; *Frederiksted and Charlotte Amalie, Virgin Islands*, 12 FCC Rcd 2406.

III. The Commission Should Not Conduct a Comparative Analysis of the Public Interest Benefits that Would Result From Each of the Proposals in this Proceeding Because the Snyder Application Does Not Constitute a Counterproposal.

In support of Heftel's request that the Commission conduct a comparative evaluation of the claimed public interest benefits of its proposal with the benefits that would result from Metro's and Snyder's respective proposals, Heftel notes that the Commission treated the Snyder Application as the "functional equivalent" of a counterproposal in this proceeding. Petition, p. 7, citing *R&O* at ¶12.

⁶(...continued)
specified in a pending application (and subsequent construction permit) of another station).

On January 28, 1998, the Commission released a public notice stating that the Snyder Application was being considered as a counterproposal in this proceeding.⁷ The Commission issued the *Public Notice* despite the following facts: (i) in MM Docket No. 90-555,⁸ the Commission made a public interest determination that the public interest would be served by allotting Channel 240C1 to Mineral Wells; (ii) the Snyder Application, which was filed prior to the initial comment deadline in this proceeding, constitutes an expression of interest in that facility; and (iii) Heftel's rulemaking petition failed to protect the reference coordinates of the Channel 240C1 allotment in accordance with the Commission's rules. Because Heftel's proposal was not "technically correct and substantially complete" as of the initial comment deadline, and, thus, has been defective from the outset of this proceeding, the Commission erred in treating the Snyder Application as a counterproposal and should have dismissed Heftel's defective proposal.⁹ Therefore, there is no basis for comparing the perceived public interest benefits of Heftel's reallocation proposal *vis-a-vis* those of Metro's and Snyder's respective proposals.

Nevertheless, even assuming, *arguendo*, the Commission were to affirm its earlier determination that the Snyder Application constitutes the "functional equivalent" of a counterproposal in this proceeding (*R&O* at ¶12), Heftel's request for a comparative public-interest-benefit analysis of the respective proposals should not be granted. Indeed, the demise of Heftel's agreement with Snyder, and Snyder's decision to continue to prosecute the pending Snyder

⁷ See *Public Notice*, Report No. 2251 (released January 28, 1998) ("*Public Notice*").

⁸ *Mineral Wells and Winters, Texas*, 7 FCC Rcd 1791 (Allocations Branch 1992).

⁹ *Cloverdale, Montgomery and Warrior, Alabama*, 12 FCC Rcd 2090; *Carlisle, Irvine, and Morehead, Kentucky*, 12 FCC Rcd 13181; *Frederiksted and Charlotte Amalie, Virgin Islands*, 12 FCC Rcd 2406.

Application from its original C1 site,¹⁰ dooms Heftel's plan due to its short-spacing to both the Channel 240C1 allotment at Mineral Wells and the Snyder Application. For this reason, Heftel cannot effect its untimely reallocation proposal or achieve the site change it needs at Mineral Wells through its instant reconsideration request, regardless of the comparative merits of its proposal. Therefore, the Commission properly conditioned the commencement of program tests at Heftel's proposed facilities (Channel 300C1 at Lewisville and Channel 300A at Robinson) upon the grant of a construction permit to Snyder to operate on Channel 240C1 at Mineral Wells from a site that would accommodate the allotment of Channel 237A at Jacksboro. *See R&O* at ¶13.

V. Conclusion.

As demonstrated herein, the Snyder Application constitutes a continuing expression of interest in the Channel 240C1 allotment at Mineral Wells, which was filed long before the initial comment deadline in this proceeding. Thus, because Heftel failed to protect the reference coordinates of the Channel 240C1 allotment in accordance with the FCC's rules and established Commission policy, Heftel's proposal was not technically correct and substantially complete as of the comment deadline.

Furthermore, Heftel's request that the Commission conduct a comparative analysis of the public interest benefits that allegedly would result from each of the proposals in this proceeding must be denied because the Commission erred in treating the Snyder Application as a counterproposal. Indeed, the Heftel/Snyder settlement proposal constituted nothing more than a belated attempt to cure the fatal, technical deficiency in Heftel's original proposal, which could not be cured after the initial comment deadline. Moreover, Heftel's Petition establishes that the parties' settlement

¹⁰ See Snyder Application for Review, filed September 21, 1998.

proposal has been terminated, and Snyder's Application for Review, filed September 21, 1998, makes clear that Snyder intends to continue to prosecute the timely Snyder Application at a site which is inconsistent with Heftel's reallocation proposal. Therefore, Heftel's Petition should be denied, and its Petition for Rulemaking, filed July 26, 1996, should be dismissed.

WHEREFORE, in light of the foregoing, Metro Broadcasters-Texas, Inc. respectfully requests that the Petition for Partial Reconsideration filed by Heftel Broadcasting Corporation be DENIED, that the Petition for Rulemaking, filed July 26, 1996, by Heftel Broadcasting Corporation be DISMISSED, and that the Commission AMEND the FM Table of Allotments by substituting Channel 237C2 for Channel 237C3 at Howe, Texas, and MODIFY the license of Station KHYI, Howe, Texas, to specify operation on Channel 237C2 in lieu of Channel 237C3.

Respectfully submitted,

METRO BROADCASTERS-TEXAS, INC.

By: _____

Harry C. Martin
Andrew S. Kersting

Its Counsel

Fletcher, Heald & Hildreth, P.L.C.
1300 North Seventeenth Street
11th Floor
Arlington, Virginia 22209
(703) 812-0400

October 5, 1998

c:\ask...martin\m\lewisopp.pet

CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 5th day of October, 1998, copies of the foregoing "Opposition to Petition for Partial Reconsideration," were hand delivered or mailed first-class, postage pre-paid, to the following:

Andrew J. Rhodes*
Special Legal Advisor
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., Room 536
Washington, DC 20554

John A. Karousos, Chief*
Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., Room 565
Washington, DC 20554

Ms. Kathleen Scheuerle*
Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., Room 565
Washington, DC 20554

Mr. Dale Bickel*
Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 332
Washington, DC 20554

Roy R. Russo, Esquire
Lawrence N. Cohn, Esquire
Cohn and Marks
1333 New Hampshire Avenue, N.W.
Suite 600
Washington, DC 20036
Counsel for Heftel Broadcasting Corporation

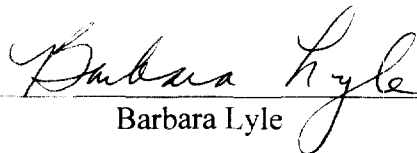
Mark N. Lipp, Esquire
Shook Hardy & Bacon
Suite 600
801 Pennsylvania Avenue, N.W.
Washington, DC 20004
Counsel for Hunt Broadcasting, Inc

Robert Healy, Esquire
Smithwick & Belendiuk, P.C.
1990 M Street, N.W., Suite 510
Washington, DC 20036
Counsel for Jerry Snyder and Associates, Inc.

Erwin G. Krasnow, Esquire
Verner, Liipfert, Bernhard,
McPherson & Hand, Chartered
901 15th Street, N.W., Suite 700
Washington, DC 20005
Counsel for Graham Newspapers, Inc.

William J. Pennington, Esquire
P.O. Box 403
Westfield, Massachusetts 10186
Counsel for Great Plains Radiocasting

John F. Garziglia, Esquire
Pepper & Corazzini, L.L.P.
1776 K Street, N.W., Suite 200
Washington, DC 20006
Counsel for K95.5, Inc.


Barbara Lyle